DCI/IC 78-1801
10 January 1978

MEMORANDUM FOR: General Counsel

STAT ATTENTION: [redacted]

STAT FROM: [redacted]
Acting Deputy to the DCI for the
Intelligence Community

SUBJECT: PRM/NSC-29: Revision of Executive Order 11652

REFERENCE: OGC Memorandum, OGC 78-0016, dated
3 January 1978

1. In response to reference, Intelligence Community Staff comments on the draft Executive Order on security classification are set forth below and in the attachment hereto.

2. The most serious problem with the order as drafted pertains to policy on declassification. Section 4(a) of the draft specifies a requirement for a balancing test, weighing public interest in access against national security needs to protect information, to be made at time of declassification review. The DCI recommended a balancing test in commenting on the earlier draft of the Order, but did so in the expectation that it should and would be worded in such a manner to insure retention of control of the balancing process in the Executive Branch. The passive voice construction in the present draft--"...it can be demonstrated...."--would not so retain that control. The draft's language would place any parties, e.g., Morton Halperin vs. the DCI in Freedom of Information Act litigation, to a dispute over extension of classification on an equal plane in arguing what "demonstrates" that balance. In such circumstances, the courts would be called on to decide. But the courts lack the expertise to make national security judgments. We therefore recommend that the fourth sentence of section 4(a) of the draft be changed to read: "Whenever information is reviewed, it shall be declassified unless ~~it can be demonstrated~~ an official authorized to extend classifications determines or approves a determination that: (1) disclosure...." This would retain explicit control of the balancing test in the head of the agency authorized to extend classifications. The "or approves a determination" language above is designed to relieve agency heads of the onerous duty of personally reviewing and adjudicating items of classified information.

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3. A second problem with the draft order is that it does not explicitly or implicitly provide for any "catch-up" period during which information now marked for declassification review after 30 years can be screened on an orderly basis. Without some provision for such, the draft order would appear not to permit classifications to extend beyond 30 years without review except for foreign-originated information. This problem was recognized during PRM-29 discussions, and agreement was reached that a ten-year "catch-up" period should be provided during which old records could be screened and 20-year currency be attained for all systematic reviews. We do not view it as adequate that this concept be stated only in the implementing directive, as some involved in the drafting process argue. We therefore recommend that the first sentence of section 4(h)(1) of the draft order have the following language added at the end thereof: ", except that information classified under prior Orders and marked for declassification or review for such in more than 20 years from date of origin, may retain its classification for a period not to exceed 30 years or January 1, 1988, whichever comes first, pending accelerated systematic review in accordance with the directive implementing this Order."

4. Other corrections or changes which should be made to the draft Order are stated in the attachment.

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Attachment:
ICS Comments on Draft E.O.
on Security Classification

IC STAFF RECOMMENDED CHANGES TO DRAFT EXECUTIVE ORDER
ON "NATIONAL SECURITY INFORMATION"

References to sections are to sections of the draft Order as circulated by the Office of Management and Budget on December 27, 1977.

1. Sections 1(d) and 1(e). The definitions given therein for "intelligence method" and "intelligence source" are too complex and include tests which are no longer appropriate given changes elsewhere in the draft Order. The test of suffering "reduced effectiveness if exposed" for each was originally included in the expectation that sources and methods so defined would be automatically classified without the need to make a separate determination of at least significant damage to national security if the information was disclosed. Since that expectation was not realized, the test should be dropped. Further, the definitions should not use the terms defined in the definitions themselves. Lastly, the future availability of sources or methods which need security protection should be expressed in reasonably definite terms, i.e., "planned to be" instead of "may be" used. Recommend that sections 1(d) and 1(e) be changed to read:

> "(d) 'Intelligence method' is any means used or planned to be used in the collection or analysis of foreign intelligence or foreign counterintelligence."
> "(e) 'Intelligence source' is any person, thing, condition, or event from which foreign intelligence or foreign counterintelligence has been, is, or is planned to be derived."

2. Section 2(e)(1). The prohibition here against classification for the purpose of concealing violations of law or other improper acts is a political necessity, but should be expressed to ensure that the purpose is clear. As drafted, the prohibition would cloud the validity of a classification which incidentally described a violation of law, etc., but which was primarily and properly based on valid national security considerations. Recommend that section 2(e)(1) be changed to read: "No information may be classified in order to conceal violations of law, inefficiency,...."

3. Section 2(f)(5). The first sentence, changed in the draft to broaden its application, needs to be revised to make it grammatical. Recommend it be changed to read: "No Executive Branch employee without ~~specifically granted~~ original classification authority specifically granted pursuant hereto ~~herein~~ may originally classify information under this Order...."

4. Section 4(b)(3). The first sentence needs to be revised to show that there are alternative, not additive, functions assigned herein. Recommend it be changed to read: "The Director of the Information Security Oversight Office may declassify or downgrade information when the

Director determines that its classification violates this Order, ~~and in the~~ or when he exercises ~~of~~ his appellate function pursuant to Section 4(g)(2)."

5. Section 4(e). This section, which speaks to how previously classified information shall be routinely declassified or reviewed for declassification, refers to other provisions of the Order for review procedures in the case of information which does not bear certain markings. One of the references, to mandatory reviews under the Freedom of Information Act, etc., is in error, since the presence or absence of the specified marking has no bearing on the susceptibility of information to mandatory review. Recommend that the second sentence of this section be changed to read: "Information not so marked shall be reviewed for declassification in accordance with subsections ~~(g) and~~ (h) below."

6. Section 4(g)(4). This section, enjoining refusal to acknowledge the existence of a document in response to a Freedom of Information Act request unless the fact of existence is classified, needs to show that it pertains to information classified under prior Orders as well as the draft one. Recommend change to read: "No Agency in possession of a document classified under the provisions of this or prior Orders may,...."

7. Section 6(c)(3). The last sentence of this section was added at the suggestion of one of the PRM-29 ad hoc committee members for the purpose of trying to ensure that Cabinet officers, comparable officials, and the Director of the new Oversight Office would be made aware of all of one another's compartmented programs. The stated rationale--to try to avoid the potential for another Pearl Harbor--was not supported by any examples since the end of World War II. Lacking a compelling argument for such an information exchange (e.g., the DCI would have to give the Administrator of the General Services Administration access to his (DCI's) list of all intelligence compartments), the minimum requirements of need-to-know argue strongly against having the Order state such a requirement. Recommend therefore that the last sentence of this section be deleted.

8. Section 7(a)(1)(vii). This, listing some of the responsibilities assigned to the Director of the new Oversight Office, does not reference the section of the draft Order which governs the first of the two powers assigned by this section. Recommend that it be changed to read: "exercise case-by-case classification authority in accordance with section 2(g), and review requests...."

9. Section 7(a)(2). This section, listing officials who shall appoint representatives to sit on a committee to advise the Director of the new Oversight Office, needs to be corrected so as to state correct titles. Recommend the first sentence be changed to read: "There is also established an Interagency Information Security Committee which...shall be comprised of representatives of the Secretaries of..., the Director of Central Intelligence, the Assistant to the President for National Security Affairs ~~Council Staff~~, the Assistant to the President for Domestic Affairs and Policy ~~Staff~~,...."

10. Section 7(b)(1). The requirement herein for agencies to submit to the new Oversight Office, in advance of the effective date of the Order, copies of regulations they adopt to implement the Order, incorrectly requires submission of guidelines for systematic declassification review. Section 4(h)(2) of the draft Order explicitly says such guidelines are to be submitted within 180 days after the effective date of the Order. Further, section 7(b)(8) of the Order states all necessary requirements for the initial submission of such guidelines. Recommend therefore that the words "and systematic review guidelines" in the first sentence be deleted.

11. Section 8(a). The sanctions directed herein against those who consciously disclose properly classified information should apply both to information classified under this and prior Orders. Recommend therefore that the first sentence be changed to read: "Any officer or employee of the United States who...knowingfully and willfully, and without authorization, discloses information properly classified under this or prior Orders...."

12. Section 8(b). The listing of authorized sanctions should be expanded to include the option of revoking access to classified information. Recommend therefore that the section be changed to read: "Sanctions may include...termination of classification authority or access to classified information,...."

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